No. 11840

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

THE PULLMAN COMPANY, a corporation,
Appellant

v.

MAGGIE MAE TEUTSCHMAN,
Appellee

Upon Appeal from the District Court of the United States for the District of Oregon

APPELLEE'S BRIEF

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SUBJECT INDEX

CASES AND AUTHORITIES CITED

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APPELLEE'S STATEMENT OF FACTS

Plaintiff-appellee purchased a ticket on the Los Angeles, Portland Southern Pacific train at Los Angeles, California. At the same time she also purchased a lower berth for the night of January 9, 1946, on Appellant's sleeping car. She occupied a seat in the chair car of the Southern Pacific Railway during the daytime part of her journey, and it was necessary for her to change trains to get on Appellant's sleeping car in which she had a berth. Following the direction of the Pullman Conductor she boarded a certain sleeping car operated by Appellant.

She was then informed that she did not have a ticket for a lower berth and would have to occupy an upper berth. At this junctore she informed both the Conductor of the Pullman car and the Pullman porter that she had never ridden on a sleeping car before, that she was unacquainted with the use of sleeping-car berths, and particularly an upper berth (Appellee using the words "It's all Greek to me.") (R. 56), and she expressed great fear and reluctance to entering the upper berth. She further stated that she did not want to go up the ladder used to assist passengers into upper berths and was afraid to occupy the upper berth (R. 55-56). She was confused, tired and excited.

Despite these warnings, her confusion, age and excitement, she was given no instructions regarding the occupancy and use of an upper berth, nor as to the fastening of the curtains or safety devices. Further, she saw no curtains on the berth, and if there were any the porter did not pull them closed or inform her about them. She was permitted to fall to sleep without removing her clothes and without the curtains being pulled.

Appellee is an elderly woman of eccentric habits and appearance, without any prior experience on a sleeping car. The record shows that she called to the attention of Appellant's servants by her conduct and her words this lack of experience. Witnesses for Appellant also testified as to her confusion, her pecularity and infirmity. (R. 130-135, 140-152, 154-167, 175-178, and page 216.) Naturally Appellee was her only witness regarding the accident as she was traveling alone; but the trial court was

in a position to observe and did observe the Appellee during the course of the trial and her testimony. It is evident that the court's observation of her conduct and appearance during the trial influenced its decision.

Some time during the night, while asleep, Appellee was caused to fall from the upper berth. She was next aware of events when on the floor of the sleeping car. Shortly thereafter she lost consciousness and regained full consciousness only after she had been treated for her injuries at the hospital.

She received serious personal injuries and the Court awarded damages as set out in Appellant's statement of facts in this case.

Appellant's witnesses contended that Appellee gave the appearance of intoxication and attributed her apparent intoxication, not to liquor, but to nebutol tablets which she was alleged to have been taking. There was no direct evidence of her having taken said tablets, but it was contended by Appellant that such was the case. Regardless of whether or not she was under the influence of this medicine, it is agreed that she did not give the appearance of normality to the employees of the Pullman Company. (R. 159-160.)

Plaintiff-appellee alleged in her complaint, and it was made an issue in the pre-trial order, that she was an elderly woman and unfamiliar with travel. The Court found, based on said allegations and the evidence, that she was in a confused and crippled condition, and Appellant was well aware thereof, and therefore, she was entitled to greater protection than the ordinary traveler.

APPELLEE'S ANSWER TO APPELLANT'S ARGUMENTS

1. Appellant contends that "There was no substantial evidence of an abnormal condition of Appellee, within the knowledge of Appellant, requiring it to take extraordinary precautions for her safety." In support of this contention Appellant cites several cases in an attempt to establish a rule whereby the consideration of evidence introduced by Appellant at the trial regarding Appellee's confused condition would be excluded from consideration merely by virtue of the fact that Appellee denied taking certain medicine.

Then Appellant, by ignoring all the evidence introduced, showed Appellee to have been confused, and by ignoring what was obvious to any person observing Appellee during the course of the trial—the Appellee's age, eccentricity, ignorance, and inexperience,—tries to point out that the only evidence establishing a state of confusion is negatived by Appellee's statement that she did not take certain medicine.

In apparent support of said rule, Appellant cites several cases taken mainly from an annotation in 80 A. L. R. 625. Reading the text of some of the cases cited will show that what seems to be the rule favored by the annotator is not always the rule established by the cases cited, or the rule to be adduced from the whole of the fragmentary texts that are included in Appellant's brief. One of the leading cases cited in this annotation is Hill vs. West End Street R. Co., 33 N. E. 582 (cited and quoted on page 11 of Appellant's

Brief). Reading this case will show that it establishes a rule diametrically opposed to that rule Appellant is trying to establish. Quoting at length from Hill vs. West End Street R. Co., supra, we find the following language:

> "There is no sound reason why the familiar doctrine that a party may contradict, though not impeach, his own witnesses, should not, if the circumstances are consistent with honesty and good faith, be applied when the party is himself the witness; nor, under the same circumstances, is there any reason why, he may not rely on the testimony of witnesses called by the adverse party * * *.
>
> "Even when witnesses are found to have *deliberately testified falsely* in some *material* particular, we are *not* required to reject the whole of their uncorroborated testimony, but may credit such portions of it as they deem worthy of belief."

In this case, as in the instant one, plaintiff testified in such a manner as to contradict the witnesses of the other side, but it was held proper for the court to use the testimony of the opposing witness to support plaintiff's case.

It was stated to like effect in Larson Co. vs. Wrigley Co., 253 Fed. 914 (cited at page 12 of Appellant's Brief):

> "Undoubtedly a litigant has no cause for complaint if the court accepts his solemn and sworn admissions in pleadings and testimony as true. *But we must reject* the contention that his adversary *has the right to compel the court to do so.*"

The general principles of a hard and fast rule cannot be drawn to cover all cases, as stated in the annotation in 80 A. L. R. 626, a part of which comment is quoted on page 12 of Appellant's Brief:

> "A search for a general principle deducible from the foregoing cases does not yield satisfactory results. The attempt of some courts to draw an analogy between the statements of parties on the witness stand and judicial admissions contained in pleading and agreements of counsel is not entirely convincing * * *."

The editor then quotes a part of the comment from Hill vs. West End Street R. Co. (supra), and goes on to set down certain standards. One of these standards is as follows:

> "Was the party at the time when the occurrence about which he testified took place, and when he testified, in full possession of his mental faculties?"

The reported case, and the one on which 80 A. L. R. 619, is built, is Kanopka vs. Kanopka, 113 Conn. 30, 154 Atl. 144, 80 A. L. R. 619, which establishes a rule contrary to that contended for by Appellants. The annotator in commenting on that case has stated:

> "Also in the reported case, Kanopka vs. Kanopka, ante 619, the court says that, unless it amounts to such a stipulation or waiver as to have the force of a judicial admission, the testimony of a party to a fact is ordinarily no more conclusive on him than the evidence given by any other witness; and it is the duty of the court or jury to determine the fact, not alone from the testimony given by the party, but from all the evidence in the case. It was also observed that under the circumstances *there was no basis for the defendant's claim* that the testimony of the plaintiff should be taken to have the effect of an express waiver or judicial admission by which she was expressly bound, and that the trial court was thereby legally compelled to find the fact from her confused, uncertain, and in some respects, contradictory evidence, and was

thereby precluded from considering the testimony of other witnesses and deciding the case in accordance with the actual facts as they might appear from all the evidence produced."

It will be readily seen that even under the cases cited by Appellant there would be an exception to this rule, if said rule can be said to exist, in a case such as this. The age and eccentricity of Appellee would excuse a misstatement, if such was made. If the court in its discretion saw fit to credit part of the confusion to medicine alleged to have been taken, the trial court was certainly justified in so doing when we consider the condition of the Appellee both at the time of the accident and at the time of the trial. The natural suspicions of the ignorant and uneducated at a trial may lead to a blanket denial of apparently unimportant facts; but it would be unjust for the Appellant corporation in this case and its learned counsel to grasp at this mistake of ignorance to excuse themselves from their own breach of duty.

But regardless of whether or not such a rule could be established in other jurisdictions, the matter is conclusively established in the instant case by the case of Cox vs. Jones, 138 Ore. 327, 5 Pac. (2d) 102. This case, establishing the rule of lex fori of the instant case, is binding on the court. In that case a rule was clearly enunciated that testimony by plaintiff which is contrary to testimony of witnesses for defendant will not preclude plaintiff from relying upon the testimony of the defendant's witnesses.

In Cox vs. Jones, supra, the court cited with approval

from the case of Wiley vs. Rutland R. Co., 86 Vt. 504, 86 Atl. 808. It was contended that:

> "* * * her own testimony in this respect, being as to a matter within her own knowledge, was in the nature of a judicial admission and therefore, as against her in this case, of conclusive effect. But this is overlooking the distinctive characteristics of judicial admission made by a party, or his attorney, in court, on the trial of a cause. Such admissions are formal acts done for the purpose of dispensing with the production of evidence by the opposing party of some fact claimed by the latter to be true, and are of conclusive effect, unless relieved against in the discretion of the court. The statement here claimed by the defendant to be conclusive against the plaintiff, constituted a part of her testimony as a witness on the trial of the cause. Considered as a statement against her interest, it was not an admission, distinct and formal in character, nor was it made for the purpose of dispensing with the formal proof of any fact at the trial. It was not therefore in the nature of a judicial admission, having conclusive effect in law. It has been held by this court that admissions made by a party in giving testimony as a witness on the trial of a cause, are not controlling against him, as a matter of law, when shown by the opposing party on a subsequent trial of the same case. LaFlam vs. Missiquoi Pulp Co., 74 Vt. 125, 52 Atl. 526. *Neither are they, being informal, conclusive in law on the trial at which the party gives the testimony.* Matthews vs. Stroy, 54 Ind. 417; Shepard vs. St. Louis Transit Co., 189 Mo. 362, 87 S. W. 1007; Zander vs. Transit Co., 206 Mo. 445, 103 S. W. 1006, etc."

Thus, there is established a law of the Forum by the Supreme Court of Oregon; that an admission of plaintiff in testimony at trial is not conclusive against her when contradicted by other evidence.

This being a matter of procedure, the Federal Court, under the rules of conflict of laws, is bound to follow the law of the state in which it is sitting, to-wit: that of the State of Oregon. cf. 11 Am. Jur. 251.

> 54 Am. Jur. 981: "If by the conflict of laws rule of the state in which the Federal Court is sitting the ultimate question is regarded as procedural and therefore determinable by the law of the forum state, the Federal Court must apply the state law of the forum."
> 54 Am. Jur. 983: "It has been held that the question of whether evidence sufficient to support some of the counts of the complaint is enough to support a general verdict for the plaintiff despite the insufficiency of the evidence to sustain the other counts is one of practice or procedure, upon which the Federal Courts are bound to follow the State rule, even where such rule is contrary to an express holding of the United States Supreme Court."

We again call the Court's attention (and this is most important) that this question of taking or not taking the medicine is only a small and indeterminate part of the evidence and testimony establishing Appellee's confusion and inability to properly care for herself; however, under the rule as it must be applied by the trial court, the trial court could have believed with propriety that Appellee did actually take the medicine as Appellant's witnesses insisted, and that her condition was impaired by its effects.

> See testimony of E. L. Deering, Esther Deering, page 130 through 135.
> See testimony of L. Rainey, page 140 through 152.
> See testimony of Laurine K. Smith at page 175 through 178.
> See testimony of B. A. Paisley, page 154 through 167.

Again we emphasize we are not relying upon the mere fact that there is evidence that Appellee was under the influence of a drug. Her confusion is more strongly established by her peculiarities of habit, as evidenced at trial; by her dress, speech, luggage (her violin case, R. 157), and her mannerisms, plainly those of an elderly person requiring special help. Further, her proclaimed lack of traveling experience and her reluctance to use an upper berth cartainly gave a warning to, and placed a burden on the Pullman Company to instruct her as to the use of the berth and to see that she was safely inside and that the buttons were properly fastened.

The cases cited by Appellant regarding drunkards are not in point. In those cases the intoxicated person does not ask for help. Here we have plaintiff strenuously stating to Appellant's servants that she needed help. They could not fail to notice her confusion, indeed they admitted it, and they must have heard her protests; but the Pullman porter sloughed off her protests of ignorance with a silent and lazy indifference as to her safety. (R. 58.) He admits that a fuss was made (R. 146), but states that he doesn't remember anything about it. (R. 152.)

The high degree of care owed to passengers is well established. Admittedly the standard required for the protection of an elderly and confused woman who loudly asks for protection, requires that she at least be instructed as to her safety. In her confusion and excitement she deserved verbal instruction and physical help. She got neither. See Pierce vs. Northern Pacific Ry., 127 Ore. 462; 62 A. L. R. 644.

Unless the trial court erred as a matter of law, the appellate court is bound to accept its finding. As to the facts of the case the trial court's decision is binding. The trial court heard all the testimony and more important, the manner in which it was given, and could best tell what type of woman plaintiff was and whether her allegations of age and inexperience were honestly made. Certainly there was sufficient evidence on which to legally base the trial court's decision. In fact, under the circumstances the trial court could hardly have found otherwise.

2. Appellant in this argument attempts to question whether this negligence is the proximate cause of the injury. In this as in the above matter, the trial court's decision is binding upon the Appellate court unless it would be manifestly impossible for defendant's negligence to be the proximate cause of the injury.

If Appellant is seriously relying on this contention, let it be stated that the reason for buttoning curtains is to prevent the imminent danger of being thrown out of the berth. That is what happened to Appellee and that is why it happened, nothing intervened.

The Appellant attempts to contend that plaintiff attempted to leave the berth. Appellant's own evidence shows that earlier that night the conductor had to push plaintiff's foot back inside the open curtain and he failed to fasten it thereafter. (R. 161.) That alone would negative Appellant's contention and fortify the trial court's decision. It is obvious that the Court felt that if her leg would work itself outside the curtain by the movement of

the train, she not only could but did fall out. Why did the Conductor fail to awaken her and tell her to fasten the curtain, or fasten the curtain himself?

But supposing she did attempt to leave the berth, and *there is no evidence establishing such an attempt and we do not admit it,* would it not be true that the callous indifference of Appellant's servants to Appellee's proclamation of ignorance as above set out, and their failure to instruct her as to the use of the upper berth, establish sufficient grounds under such circumstances. Appellee definitely does not recall her fall. The testimony is clear in that regard. If she were attempting to leave the berth, there should have been evidence to that effect.

3. Appellant attempts to show that there is contributory negligence on the part of plaintiff as a matter of law. In this, too, the trial court's finding is binding on the Appellate court. The answer to this argument can be found in reading our answer to arguments 1 and 2 of Appellant's argument. It can be summed up as follows: her confusion and condition made her unable to provide for her own safety any further than she did by protesting and in asking for instruction.

4. The question of a motion to dismiss if raised here in other than a perfunctory manner is disposed of by the foregoing arguments.

5. The Appellant contends that there was no issue at the trial of whether Appellee's condition was so abnormal as to require Appellant to fasten the inside buttons. There is no question but that the complaint and pre-trial order

put in issue the fact of plaintiff's age and inexperience. The obligation to use a higher degree of care toward plaintiff than the ordinary traveler, was one of the main issues of this action. The Court found that the obligation existed and was impressed by the evidence of both Appellee and the several witnesses of Appellant, that her age and inexperience resulted in her absolute helplessness and confusion.

This was the issue and from what Appellee's counsel could learn from such an aged, confused and ignorant client, there were no curtains on the berth at all. The issue was raised in the alternative that either there were no curtains on the berth, or if there were curtains defendant's agents failed to close and fasten the same, or to equip the berth with protective straps or inform plaintiff about the use thereof. See pre-trial order, paragraph 6 (R. 23). Naturally we rely on the rules of civil procedure which permit the court to treat matters that have been submitted at trial as having been pleaded. But such a reliance is not necessary as we feel that the issues were properly raised.

SUMMARY

The Appellate court should be made aware of the fact that Appellee is poor, ignorant and unable to support herself. That the trial was had at great expense to her and included the necessity of taking two depositions in California. This appeal entails still greater expense which Appellee is unable to meet herself. While this has nothing to do with the issues here involved, it does affirm the rule that the findings of fact of a trial court are binding.

We feel that the Honorable Claude McColloch, the trial Judge, was best able to determine whether or not there was liability. He saw and heard all the testimony and observed plaintiff and her obvious inexperience, age, and confusion. His finding is most persuasive even in absence of the fact that this Court is bound to follow it.

We have prosecuted this case under the disability of having a client who, while not incompetent, was unable to be of any real assistance because of this confusion, inexperience, and age. The record speaks for itself, and we feel that the judgment should be sustained and that we receive our costs on this appeal.

Respectfully submitted,

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